Supreme Court, U.S.
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No. 87-720

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ETHEL HAGEN,

Intervenor and Appellant,

vs.

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, etc., et al.

Defendants and Appellees,

ON APPEAL FROM THE
SUPREME COURT OF SOUTH DAKOTA

MOTION OF DEFENDANTS AND APPELLEES STATE OF SOUTH DAKOTA, etc., et al., TO DISMISS

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and Appellees

December 2, 1987

QUESTION PRESENTED

The question presented by this motion to dismiss is whether Appellant's failure to docket the appeal within the specified time warrants its dismissal and whether the federal question sought to be raised by Appellant was expressly passed on by the South Dakota Supreme Court, where

(a) Appellant's Jurisdictional Statement was filed forty-two days after the appeal deadline followed by an Amended Jurisdictional Statement filed ninety-six days after the appeal deadline and no extension was requested or granted pursuant to Rule 12.2 of the Supreme Court of the United States, and

(b) The issue presented by Appellant was not expressly passed on by the South Dakota Supreme Court in the case from which Appellant appeals.

PARTIES TO PROCEEDINGS BELOW

Original parties before the South Dakota Supreme Court: (1) State of South Dakota, the South Dakota Board of Regents, the South Dakota Board of Charities and Corrections and John J. Gerkin, Commissioner of School and Public Lands as Defendants and Appellees herein; (2) Douglas J. Kanaly, Patrick S. Konechne, Dennis Lihs, Robert McBride, Donald Van Cleave and Joseph W. Wolf, as Plaintiffs and Appellees herein; (3) Robert R. Weber and Raymond Martinmaas, as Intervenors; (4) Ethel Hagen, the Intervenor and Appellant herein.

This motion to dismiss is brought solely by Defendants and Appellees above-named.

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STATE OF SOUTH DAKOTA, etc., et al.,
TO DISMISS

Pursuant to Rule 16.1, the Defendants and Appellees State of South Dakota, etc., et al., move to dismiss the appeal filed on behalf of Ethel Hagen,

the Intervenor and Appellant herein. The motion is grounded on the fact that the appeal was not taken in conformity with the Rules of the Supreme Court of the United States, nor does the appeal present a federal question that was expressly passed on by the court below.

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. § 1257 provides that "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court. . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. 1257(2).

STATEMENT

The jurisdictional problem posed by the appeal to this Court is found in the culmination of the following procedural developments:

1. On May 29, 1985, the South Dakota Supreme Court handed down Kanaly v. State by and through Janklow, 368 N.W.2d 819 (S.D. 1985)(hereinafter Kanaly I) in which the court considered various attacks on Senate Bill 221/1984, now found in 1984 S.D.Sess.Laws ch. 138 which closed the University of South Dakota-Springfield (USD/S) and transferred control of the facilities to the South Dakota Board of Charities and Corrections without consideration. Intervenors, including Appellant herein, filed an amicus curiae brief on their own behalf challenging the statute.

2. The case from which Appellant appeals, Kanaly v. State by and through Janklow, 403 N.W.2d 33 (S.D. 1987)(hereinafter Kanaly II) was decided by the South Dakota Supreme Court on March 25, 1987. Petition for rehearing was denied April 30, 1987. Notice of appeal was filed by Appellant in the South Dakota Supreme Court on July 27, 1987, within the time set forth by statute. 28 U.S.C. 2101(c).

3. On September 9, 1987, Appellant entered an appearance, submitted the docket fee, and filed a jurisdictional statement. An amended jurisdictional statement was filed on or about November 2, 1987.

4. In both the original and amended jurisdictional statements,

Appellant presents only the following question for resolution by this Court:

> Is chapter 138, South Dakota Session Laws of 1984 (S.B. 221) unconstitutional in that it is repugnant to the provisions of the North Dakota-South Dakota Enabling Act and would change the University of South Dakota at Springfield, a federal land grant college, into a prison?

See Jurisdictional Statement, p. 1 (not paginated); Amended Jurisdictional Statement, p. i.

5. Appellant claims that in Kanaly II, supra, the South Dakota Supreme Court held that chapter 138 of the 1984 South Dakota Session Laws (Senate Bill 221/1984) did not violate and was not repugnant to the provisions of the North Dakota-South Dakota Enabling Act. See Jurisdictional Statement, p. 2; Amended Jurisdictional Statement, pp. 3-4. However, the South Dakota

Supreme Court made no such ruling in Kanaly II, supra, but did address the question in Kanaly I, supra.

6. In Kanaly I, supra, the South Dakota Supreme Court found that certain provisions of the Enabling Act and the State Constitution create a special, permanent and perpetual trust of all land, money, property, and proceeds of the same, donated to the state for educational institutions by the United States and individuals alike and that S.B. 221/1984 (1984 S.D.Sess.Laws ch. 138) which facilitated the state is the trustee. Kanaly I, 368 N.W.2d at 822-3. The South Dakota Supreme Court determined that the transfer of the former University of South Dakota/Springfield from the Board of Regents to the Board of Charities and

Corrections was contrary to the State Constitution and violative of the Enabling Act. Kanaly I, 368 N.W.2d at 824. The court specifically held that the permanent trust fund provisions of the Enabling Act were breached by the statute and remanded the case to the trial court to conduct hearings concerning the extent and nature of all property and interest transferred to the Board of Charities and Corrections from the Board of Regents and its full market value. Kanaly I, 368 N.W.2d at 824, 829. The South Dakota Supreme Court made no such ruling or any other regarding the Enabling Act in Kanaly II, supra, from which Appellant now appeals.

ARGUMENT

1. THE APPEAL SHOULD BE DISMISSED BECAUSE IT WAS NOT TAKEN IN CONFORMITY

WITH THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The Rules of this Court provide that not more than ninety days after the entry of the judgment appealed from or the denial of a petition for rehearing, the Appellant must docket the case by filing, inter alia, the jurisdictional statement. See Rules 10.1, 11.3, 12.1, 12.3. Appellant's Jurisdictional Statement and Amended Jurisdictional Statement were filed forty-two days and approximately ninety-six days, respectively, beyond the appeal deadline. No request for an extension of time was made by Appellant pursuant to Rule 12.2.

In Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966), this Court declared:

> This court has been generous in excusing errors of counsel, but

> if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the court as well as due regard for our own procedures lead us to believe that this case does not warrant our indulgence.

Pittsburgh Towing, supra, at 32-33. See also Shapiro v. Doe, 396 U.S. 488 (1970).

In sum, this civil appeal should be dismissed because of the failure to conform with Rule 12 of this Court.

2. THE APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS NOT BEEN PROPERLY RAISED AND WAS NOT EXPRESSLY PASSED ON BY THE SOUTH DAKOTA SUPREME COURT.

Appellant brings this appeal under 28 U.S.C. 1257(2) which allows a review by this Court where drawn into question is the validity of a state statute on the

ground that it is repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. Appellant claims that a South Dakota statute violates certain provisions of the North Dakota-South Dakota Enabling Act. However, the South Dakota Supreme Court makes no such ruling in the case from which she appeals. See Kanaly II, supra. Nevertheless, the South Dakota Supreme Court has not been silent on the issue.

The State Supreme Court has clearly held in Kanaly I that the statute now challenged by Appellant did, indeed, violate the North Dakota-South Dakota Enabling Act. Thus, there is no decision in favor of the validity of the challenged statute vis à vis the Enabling

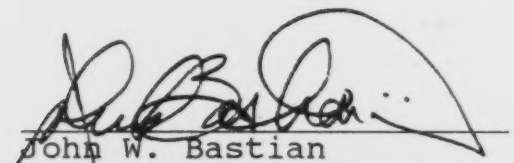
Act as alleged by Appellant and required by 28 U.S.C. 1257(2).

CONCLUSION

Based upon the foregoing argument and authorities, the appeal should be dismissed.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL



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December 2, 1987

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CERTIFICATE OF MAILING

The undersigned, a member of the Bar of the above-captioned Court, hereby certifies that forty (40) copies of the Defendants and Appellees' Motion to Dismiss in the above-entitled case, were filed with the Supreme Court of the United States, Mr. Joseph F.

Spaniol, Jr., Clerk, by mailing the same by United States mail, first class, postage prepaid, to the Supreme Court of the United States, Washington, D.C., 20543, and three (3) copies of said Motion to Dismiss to Mr. Steven M. Johnson and Ms. Celia Miner, Attorneys at Law, 200 West Third, P.O. Box 735, Yankton, South Dakota, 57078-0735, on the 2nd day of December, 1987.

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Kanaly I, we concluded that S.B. 221 would not violate Article VIII, § 7 for the full value of the property and interest transferred to the Board of Charities and Corrections. This has been done. Intervenor now suggests that S.B. 221 violates Article VIII, § 8 of the South Dakota Constitution. However, § 8 of the Constitution is simply a companion section to § 7. Therefore, because of our decision in Kanaly I, there is not now any constitutional question remaining with regard to § 8.

[1] Intervenor next contends that the Springfield campus became a dedicated educational institution on its acquisition and could be utilized for no other purpose. Intervenor relies primarily upon Patrick v. Blake, 70 S.D. 494, 19 N.W.2d 220 (1945). In Patrick, this court ruled that when a private citizen dedicates his property for a public use and the state accepts the grant, the property can be used only for the pur-

pose to which it has been dedicated. 70 S.D. at 501, 19 N.W.2d at 223. The present case is easily distinguished from Patrick, however. Here, the warranty deed from John A. Burbank by which the state acquired the land for the Springfield campus contained no restriction or reversionary clause such as that present in the deed involved in Patrick. 70 S.D. at 497-498, 19 N.W.2d at 222. Accordingly, we reject Intervenor's contention.

[2] Finally, Intervenor claims that S.B. 221 violated the due process clauses of the state and federal constitutions. These claims are unsupported by an relevant authority and are contrary to law and fact. The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived. Kelly v. Kirk, 391 N.W.2d 652 (S.D. 1986); Corbly v. Matheson, 335 N.W.2d 347 (S.D. 1983).

We again reaffirm the disposition of the constitutional claims made with respect to S.B. 221 and affirm the trial court's order dismissing Intervenor's second amended complaint.

HEEGE, Circuit Judge, for MILLER, J., disqualified.